RECENT CASES.

COMMON CARRIERS OF PASSENGERS — DUTY TO PROVIDE SEATS — RIGHT OF PASSENGER TO REFUSE TO PAY FARE. — A person who has entered a train with the intention of paying his fare has a right to refuse payment unless a seat be provided him. Not being a trespasser he can be put off only at some regular station. He could, however, become a trespasser "by refusing to leave the train on a reasonable opportunity being afforded." *Hardenbergh* v. *St. Paul M. & M. Ry. Co.*, 38 N. W. Rep. 625 (Minn.).

CONSTITUTIONAL LAW — CLASS LEGISLATION. — Pub. Acts Mich. 1885, p. 356, authorizing an attorney's fee of $25 to be taxed against a railroad company in case of judgment against it in an action for injuries to stock, on account of its failure to fence its track as required by the act, is unconstitutional and void, as being an attempt to create special advantages to one class at the expense and to the detriment of another. *Lafferty* v. *Chicago & W. M. Ry. Co.*, 38 N. W. Rep. 660 (Mich.). See also *Wilder* v. *Railway Co.*, 38 N. W. Rep. 289.

CONSTITUTIONAL LAW — CRIMINAL TRIAL — ELEVEN JURORS. — A defendant in a criminal action may, when permitted by the court, the State not objecting, consent to try his case before eleven jurors, and such trial is not unconstitutional. *State* v. *Sackett* et al., 38 N. W. Rep. 773 (Minn.).

The court put the case upon the same ground as the waiver of the right to be tried by unprejudiced jurors, both being "in some degree" questions of jurisdiction.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — TAKING PROPERTY WITHOUT COMPENSATION — OLEOMARGARINE ACT. — An act providing that no person shall manufacture or sell any substance designed to take the place of butter or cheese made from pure milk or cream, declaring void all contracts made in violation of it, subjecting the offender to a penalty and to a criminal prosecution, is *held* to be a valid exercise of the police power of the State for the protection of the public health, not depriving any one of the rights of liberty or property without due process of law, nor of the equal protection of the laws guaranteed by the fourteenth amendment of the Federal Constitution, nor in conflict with the fourteenth amendment on the ground that it deprives the citizen, without compensation, of his property acquired prior to its passage. *Powell* v. *Com. of Pennsylvania*, 8 Sup. Ct. Rep. 992.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TAX ON TELEGRAPH COMPANIES — PARTIAL VALIDITY. — A single tax, assessed under the laws of a State upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross, without apportionment, is invalid only as to that portion assessed on receipts from interstate commerce, being to this extent an unconstitutional regulation of such commerce. *Ratterman* v. *West. Union Tel. Co.*, 8 Sup. Ct. Rep. 1127.

Compare the following apparently conflicting case: Where a large part of the business of a telegraph company consists in transmitting messages between different States, no State within which it establishes an office can impose upon it a license tax based upon its gross receipts, such tax affecting the entire business of the company, interstate as well as domestic, and being an unconstitutional regulation of interstate commerce. *Leloup* v. *Port of Mobile*, 8 Sup. Ct. Rep. 1380.

CONSTITUTIONAL LAW — STATUTE PROHIBITING GIFTS WITH SALES OF FOOD. — By a statute in New York it is made a misdemeanor for any person who sells food to give away therewith, as part of the transaction of sale, any other thing as a premium, gift, prize, or reward. *Held*, to be unconstitutional, because an undue restraint of a person's liberty to follow a lawful industrial pursuit not injurious to the community. The statute is not a valid exercise of the police power, because it has no reference to the comfort, the safety, or the welfare of society; nor is it, for the same reason, a proper exercise of the power to declare what shall be a crime. The case differs from that of *Powell* v. *Com.*, 8 Sup. Ct. Rep. 992, in which a Pennsylvania statute prohibiting the manufacture and sale of oleomar-

garine was sustained, because it was there claimed that there was such danger to the health of the community from the use of improper ingredients as to justify absolute prohibition of the manufacture. A similar statute in New York was condemned in *People* v. *Marx*, 99 N. Y. 377. *People* v. *Gillson*, 17 N. E. Rep. 343 (N. Y.).

CONTRIBUTORY NEGLIGENCE — DAMAGES. — Defendant obstructed plaintiff's drain, which the latter could have repaired for $25, but by delaying to repair the damages amounted to $100. *Held*, that plaintiff could only recover $25. *Lloyd* v. *Lloyd*, 13 Atl. Rep. 638 (Vt.).

This case is a curious illustration of the celebrated case of *Davies* v. *Mann*, 10 M. & W. 546.

CORPORATIONS — "COMBINATION" — PARTNERSHIP — ULTRA VIRES. — An agreement entered into by a number of corporations engaged in manufacturing, to select a committee composed of representatives from each corporation, and to turn over to such committee the entire control of the properties and machinery of each corporation, the profits and losses to be shared in agreed proportions, and this arrangement to last for a specified time, is a contract of partnership.

A corporation has no implied power to enter into such a contract of partnership with other corporations, and unless this power is expressly conferred by the act under which the company is incorporated, such contract, whether made by the directors or by all the stockholders, is *ultra vires*, and void so far as unexecuted. *Mallory* v. *Hananer Oil-Works*, 8 S. W. Rep. 396 (Tenn.).

This case is of great importance, offering, as it does, a method for the restraint, by existing judicial machinery, of the most serious form of those mysterious combinations known as "trusts," which have been believed to be "unchecked by legal restraints or safeguards." This is accomplished without recourse to special legislation as has hitherto been deemed necessary. The doctrine of this case goes further than the control of "trusts"; it deals a death-blow to the most dangerous class, — combinations between corporations.

The case, it is to be observed, does not proceed on the theory of restraining a conspiracy against the public welfare, but goes directly to the essence of the powers inherent in a corporation, and the limitations thereupon.

EQUITY PLEADING — LAPSE OF TIME — DEMURRER. — Where a bill shows upon its face that plaintiff, by reason of lapse of time and his own laches, is not entitled to relief, the objection may be taken by demurrer. *Horsford* v. *Gudger*, 35 Fed. Rep. 388 (N. C.).

Whether such a doctrine is sound is open to serious doubt, as its application must deprive the plaintiff of his right to apply. *Langdell on Equity Pleading*, § 129.

EVIDENCE — BOOK ENTRIES. — Where a clerk testified that he weighed the wheat taken in at his employer's elevator, and set down the correct weight in the "scale-book," from which tickets were torn off and given to the farmers, and that from the stubs he correctly transcribed the weights into the day-book, the scale-book being lost, such day-book is admissible in evidence to prove the amount of such weight. But where the clerk testifies that, after weighing the grain and entering the weight in the scale-books, his course of business was to make out invoices from these stubs, and send copies daily to his employer at another place, who entered the same in his day-book, and the clerk does not testify that he entered the weights correctly or made a correct report thereof, the scale-books being lost, the employer's day-book is not admissible in evidence to prove the amount of the weights. *Missouri Pac. Ry. Co.* v. *Johnson*, 7 S. W. Rep. 838 (Tex.).

EVIDENCE — CRIMINAL LAW — ADMISSIBILITY OF FORMER CRIMES TO SHOW MOTIVE. — The defendant was indicted for murder of her sister's husband by poisoning. It could be proved that there was an insurance upon his life of $2,000, payable to his wife, the defendant's sister; that the sister died; that the defendant was appointed beneficiary under the policy; and that soon afterwards the husband died of poison. Evidence that the sister also was poisoned by the defendant was admitted, on the ground that the murder of both the sister and her husband were parts of one plan, the motive of which was to get the insurance. But it was held that evidence of the earlier crime could be admitted only after some proof of the plan has been offered. Just how much is necessary the court does not say, but makes the general statement that, while proof beyond a rea-

sonable doubt is not required, still enough must be shown "to make it proper to submit the whole evidence to the jury." *Commonwealth* v. *Robinson*, 16 N. E. Rep. 452 (Mass.).

See the note on *Sharp's case*, 2 HARV. L. REV. 98.

FACTORS AND BROKERS — REAL-ESTATE BROKERS — RIGHT TO COMMISSIONS. — Plaintiff, a real-estate broker, agreed to procure a purchaser for certain land of defendant at a price named, for which he was to receive a certain commission. He found such purchaser, and a written agreement was signed by both defendant and the proposed purchaser, by which the latter was to take the land at the price named, and was to have time to examine the title and reject the same if unsatisfactory. Within the time fixed, the purchaser made a groundless objection to the title, which was in fact good, and refused to take the land; but defendant did not sue for specific performance. *Held*, that plaintiff was entitled to the full amount of his commission. *Parker* v. *Walker*, 8 S. W. Rep. 391 (Tenn.).

If plaintiff had neglected to bind the purchaser by a contract which defendant could enforce under the statute of frauds, he could not have recovered. *Gilchrist* v. *Clarke*, 8 S. W. Rep. 572 (Tenn.).

LARCENY — CONSENT. — A detective pretended to be drunk and asleep, in order to secure evidence against any one who should attempt to rob him. He therefore made no resistance when the defendant, whom he did not suspect, took money from him. *Held*, that the defendant was guilty of larceny in spite of the detective's seeming consent. *People* v. *Hanselman*, 18 Pac. Rep. 425 (Cal.).

It is to be noted in this case that probably the detective did not intend to pass the title to, nor yet to make the defendant a bailee of, the money taken. If that is so, the decision seems to be right.

NUISANCE — MALICIOUS OBSTRUCTION OF LIGHT AND AIR. — A fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, is a nuisance. Campbell, C. J., and Champlin, J., dissenting. Full collection and discussion of authorities for and against the proposition. *Burke* v. *Smith*, 37 N. W. Rep. 838 (Mich.).

For a discussion of the general principle involved see "The Principle of Lumley *v.* Gye," etc., 2 HARV. L. REV. 19.

PARTNERSHIP — AGENT — PROFITS AS SALARY. — A person who employs another as his agent in a particular business, and agrees to give him a part of the net profits thereof as a salary, does not thereby make him his partner. *Missouri Pac. Ry. Co.* v. *Johnson*, 7 S. W. Rep. 838 (Tex.). A note collects cases.

POST-OFFICE — DECOY LETTER — LARCENY FROM MAILS. — A letter with a fictitious address, which, therefore, cannot be delivered, is not "intended to be conveyed by mail" within the meaning of the statute, and an indictment charging embezzlement of such letter will not be sustained. *United States* v. *Denicke*, 35 Fed. Rep. 407 (G.a).

PRIVILEGED COMMUNICATIONS — LIBEL. — Statements made in a petition by a receiver against his co-receiver, that such co-receiver was unlawfully witholding a portion of the assets, and was obstructing their collection, and that he had embezzled some of the trust money, are not actionable, even though they are malicious and false; such statements being made in the course of a judicial proceeding. *Bartlett* v. *Christhilf*, 14 Atl. Rep. 518 (Md.).

PRIVILEGED COMMUNICATION — SLANDER. — Slanderous words spoken by counsel in the trial of a cause are actionable, unless they relate to the cause on trial or to some subject-matter involved therein. (Two judges dissenting.) *Maulsby* v. *Reifsnider*, 14 Atl. Rep. 505 (Md.).

PROMISSORY NOTE — COLLATERAL PROMISE — NEGOTIABILITY. — A contract to pay money "with exchange on New York" is not a negotiable note. *Savings Bank* v. *Strother*, 6 S. E. Rep. 313 (S. C.).

This decision is due to a misunderstanding of the word "certainty," which in this connection means, not mathematical, but rather mercantile, certainty. Thus a promise to pay attorney's fees, while rendering the total sum to be paid uncertain, is a device to render more certain the face value of the note, and it would be so understood by business men. This view is held in *Sperry* v. *Horr*, 32 Ia. 184. *Contra* to the principal case see *Johnson* v. *Frisbee*, 15 Mich. 286, and, generally, 2 Ames on Bills and Notes, 830.

PURCHASE FOR VALUE WITHOUT NOTICE. — The plea of purchase for value without notice is no defence to a legal claim for dower. *Mitchell* v. *Farrish*, 14 Atl. Rep. 712 (Md.).

For a collection of cases where the plea of purchase for value has not been allowed, see an article by Professor Ames, "Purchase for Value without Notice," 1 HARV. L. REV. 13.

RAPE — CONSENT OF CHILD UNDER TEN. — On a trial for rape, when the indictment alleges that the act was done "forcibly and against the will" of the prosecutrix, the court errs in charging that if the prosecutrix be under ten years old, then the defendant is guilty, whether she consented or not. *State* v. *Johnson*, 6 S. E. Rep. 61 (N. C.).

TRADE SECRETS — WITNESS — PRIVILEGE. — A witness for plaintiff testified on direct examination as to the uses and effects of "Moxie" or "Moxie Nerve Food." *Held*, that on cross-examination witness could not be required to disclose the particular ingredients of that preparation, that being a trade secret, the disclosure of which would injure plaintiff's business. *Moxie Nerve Food Co.* v. *Beach*, 35 Fed. Rep. 465 (Mass.).

TELEGRAPH COMPANIES — NEGLIGENCE — DAMAGES FOR MENTAL SUFFERING. — By the Tenn. Code telegraph companies are "liable in damages to the party aggrieved" by an unreasonable delay in the transmission or delivery of messages." In an action against a telegraph company, plaintiff alleged that through unreasonable delay in the delivery of a message she was unable to reach her brother before his death. *Held*, that the mental suffering thereby caused to plaintiff was of itself a sufficient ground for the recovery of damages. *Wadsworth* v. *Western Union Tel. Co.*, 8 S. W. Rep. 574 (Tenn.).

There was an able dissenting opinion. The same doctrine has, however, been upheld in Texas. *Stuart* v. *Tel. Co.*, 66 Tex. 580.

TRESPASS — USING ONE'S PREMISES TO THE INJURY OF ANOTHER. — The defendant occupied rooms over the plaintiff's store, and, while she was scrubbing her floors, dirty water leaked through and injured his goods, though it appeared that the defendant used proper care. The plaintiff gave her notice to stop; but she refused, and asked him to move his goods. There was no evidence that either of them had any interest in the premises beyond mere possession. *Held*, that there was no duty in the plaintiff to repair the floor, and that he could recover. *Patton* v. *McCants*, 6 S. E. Rep. 849 (S. C.).

TRUSTS — CHARITABLE USES. — A testator gave all the residue of his estate to his executors, "to be by them applied for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of my soul, and the souls of my family, and also the souls of all others who may be in purgatory." *Held*, that no valid trust was created. The trust, if any, must stand on the same footing as charitable trusts in England. It is no objection that the trust is superstitious, and therefore void, as in the English law, because in this country, under the State and national constitutions, religious beliefs and forms of worship are free so long as the public peace is not disturbed, and no court may say what is and what is not superstitious. But no trust is good in New York unless the ordinary elements of a trust are present. There must be a defined and ascertained beneficiary; therefore a charitable trust is invalid. *Holland* v. *Alcock*, 16 N. E. Rep. 305 (N. Y.).

The court say that it was formerly supposed that charitable trusts were created by the statutes of 39 Eliz. c. 5, and 43 Eliz. c. 4, although it has been since discovered that such trusts were previously enforced by chancery. Such was the view when all British legislation relating to the subject was repealed in New York, with the purpose of destroying charitable trusts, and they have, therefore, ceased to exist. Undoubtedly the courts have been influenced by the fact that corporations may be formed under a New York statute for the express purpose of receiving funds to be devoted to charitable purposes, and consequently there is little necessity for charitable trusts. See, for an excellent article on charitable bequests, 27 Am. L. Reg. 213.

TRUSTS — CHARITABLE USES — PUBLIC POLICY. — The courts will not enforce a bequest for the distribution of books in which the author describes the system of landholding as a robbery, such a gift being against public policy. *Hutchins' Ex'r* v. *George* et al., 14 Atl. Rep. 108 (N. J.).

TRUSTS — RESTRAINT ON ALIENATION. — Testator conveyed real estate in trust for his son, the rents and profits to be paid into his own hands, and not into another's, whether claiming by his authority or in any other capacity. *Held*, that the income should be paid to the son to the exclusion of all other persons, whether claiming as alienees or as creditors. *Smith* v. *Towers*, 14 Atl. Rep. 497 (Md.).

The court, of course, relied upon *Nichols* v. *Eaton*, 91 U. S. 725, *Bank* v. *Adams*, 133 Mass. 170, and the Penn. cases, admitting that the law was different in England and in most of the States. See Gray's Restraints on Alienation, § 258 *et seq*, where the author does not agree with the cases of spendthrift trusts.

TRUSTS — RESULTING — MINGLING OF FUNDS. — A guardian of an infant having purchased real estate chiefly with the money of his ward, he, however, contributing a portion, and having taken the title in his own name, a trust results in respect to the property in favor of the infant who may claim afterwards not merely a lien, as security for the money, but a proportionate share of the estate. *Bitzer* v. *Bobo* et al., 38 N. W. Rep. 609 (Minn.).

For a discussion of the general principle see "The Right to Follow Trust Property," etc., 2 HARV. L. REV. 28.

UNRECORDED DEED — DOWER. — A was the grantee of certain lands by an unrecorded deed. Subsequently the grantor mortgaged the same lands to an innocent purchaser for value, and the mortgage was recorded. *Held*, that the right of dower of A's widow took priority over the mortgage. *Sondley* v. *Caldwell*, 6 S. E. Rep. 818 (S. C.).

This case, which certainly violates the spirit of our registry system (too often disregarded by the courts), seems wrong on principle. A widow's right of dower is made more effective than the right on which it depends, namely, her husband's right of title.

REVIEWS.

THE LAW OF SALES OF PERSONAL PROPERTY AS NOW ESTABLISHED IN THE UNITED STATES AND GREAT BRITAIN. By Nathan Newmark. San Francisco: Bancroft-Whitney Co., 1887. 12 mo. pp. xxi and 696.

The law of sales of personal property has been so well and fully discussed by Mr. Blackburn and Mr. Benjamin that a new treatise on the subject must possess extraordinary intrinsic merit to warrant its finding a foothold among text-books of standard authority. Mr. Newmark may be said to have fairly succeeded in his "attempt to make a concise, complete, and convenient presentation of the intricate and expanding law relating to sales of personal property," and, as a digest, his book may be found to be of considerable assistance to the practitioner.

It seems to us, however, that the author has placed too much reliance upon the "fulness of the index," and that the insertion of a table of cases would have enhanced in no small degree the usefulness of his work. To the lawyer who has become familiar with the leading cases there is nothing which renders the subject-matter of a book so readily accessible as a table of cases, and even the best-arranged index can scarcely be said to obviate its use.

From the many citations, such as "according to Bennett's Benjamin on Sales," "Schouler on Personal Property, § 188, whence paragraph derived," "Basis of paragraph: 1 Corbin's Benjamin on Sales, § 461," it must be inferred that the author has not made that personal origi-